

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
<b>Connect America Fund</b>	)	<b>WC Docket No. 10-90</b>
	)	
<b>A National Broadband Plan For Our Future</b>	)	<b>GN Docket No. 09-51</b>
	)	
<b>Establishing Just And Reasonable Rates For Local Exchange Carriers</b>	)	<b>WC Docket No. 07-135</b>
	)	
<b>High-Cost Universal Service Support</b>	)	<b>WC Docket No. 05-337</b>
	)	
<b>Developing An Unified Intercarrier Compensation Regime</b>	)	<b>CC Docket No. 01-92</b>
	)	
<b>Federal-State Joint Board On Universal Service</b>	)	<b>CC Docket No. 96-45</b>
	)	
<b>Lifeline And Link-Up</b>	)	<b>WC Docket No. 03-109</b>

**REPLY COMMENTS OF THE INDEPENDENT TELEPHONE &  
TELECOMMUNICATIONS ALLIANCE ON INTERCARRIER COMPENSATION  
ARBITRAGE ISSUES**

The Independent Telephone & Telecommunications Alliance (“ITTA”) hereby files reply comments with respect to the three intercarrier compensation arbitration issues the FCC raises in the *Notice* issued in the above-captioned proceedings.<sup>1</sup> ITTA is heartened by the agreement among the commenters that the Commission should act promptly to address phantom traffic and Voice over Internet Protocol (“VoIP”) intercarrier compensation issues. All commenters, other than the business partners of traffic pumpers, also recommend that the Commission address

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<sup>1</sup> *Connect America Fund*, WC Docket No. 10-90, *et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) (“*Notice*”). The *Notice* requests reply comments on Section XV, the three arbitration issues discussed in these comments, by April 18, 2011. 76 Fed. Reg. 11632, 11657 (Mar. 2, 2011).

illegitimate access stimulation activities. ITTA urges the FCC to heed these recommendations and to quickly adopt rules to prevent intercarrier compensation arbitrage and place intercarrier compensation upon a more stable footing.

**I. THE FCC SHOULD EXPEDITIOUSLY DECLARE THAT VOIP TRAFFIC MUST PAY THE SAME COMPENSATION AS OTHER VOICE TRAFFIC.**

The comments resoundingly demonstrate that arbitrage in the intercarrier compensation arena is rampant, growing, and leading to instability in the telecommunications marketplace. Incumbent and competitive local exchange carriers, and cable TV companies all argue forcefully for application of access charges to VoIP traffic,<sup>2</sup> as do state public utility commissions.<sup>3</sup> The instability caused by such arbitrage is counterproductive not only to carriers, but also to the consumers who rely on telecommunications networks for their businesses and personal endeavors. The potential for instability is highlighted by comment proposals to immediately establish a special price for the exchange of VoIP traffic, or requiring immediate bill-and-keep arrangements for the exchange of such traffic. For instance, XO Communications proposes that Section 251(b)(5) intercarrier compensation rates be applied to VoIP traffic. Carriers would be required to self-certify what calls originate as VoIP, subject to intercarrier audit procedures to

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<sup>2</sup> See, e.g., Comments of TDS Telecommunications Corp., WC Docket No. 10-90, *et al.*, 3 (filed Apr. 1, 2011); Comments of FairPoint Communications, Inc. on Intercarrier Compensation Arbitrage Issues, WC Docket No. 10-90, *et al.*, 6 (filed Apr. 1, 2011); Comments of COMPTel, WC Docket No. 10-90, *et al.*, 2 (filed Apr. 1, 2011); Comments of Time Warner Cable, Inc., WC Docket No. 10-90, *et al.*, 7 (filed Apr. 1, 2011). Wireless carriers oppose imposition of access charges on VoIP traffic, but this is no doubt due to the fact that they cannot collect access charges for the exchange of their interexchange traffic, but rather must pay them. Comments of CTIA—The Wireless Association®, WC Docket No. 10-90, *et al.*, 12 (filed Apr. 1, 2011); Comments of Verizon & Verizon Wireless, WC Docket No. 10-90, *et al.*, 3 (filed Apr. 1, 2011) (“Verizon Comments”).

<sup>3</sup> See, e.g., Comments of the Pennsylvania Public Utility Commission (Section XV), WC Docket No. 10-90, *et al.*, 11 (filed Apr. 1, 2011); Comments of the California Public Utilities Commission and the People of the State of California on Section XV of the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, *et al.*, 3 (filed Apr. 1, 2011).

verify the amount of traffic that is VoIP.<sup>4</sup> Vonage proposes a similar identification process, although it suggests that a bill-and-keep system be instituted from the outset.<sup>5</sup>

Establishing a separate intercarrier compensation rate for the exchange of VoIP traffic, even during the transition to comprehensive reform, would exacerbate, not ease, arbitration concerns. Setting a lower rate for VoIP-originated traffic, even though the termination of such traffic imposes identical costs to Time Division Multiplex (“TDM”) traffic, would promote arbitrage because it would encourage carriers to claim that more (if not all) traffic is VoIP so they could pay less compensation. For that reason, a large number of commenters, including ITTA, oppose such differential treatment.<sup>6</sup> Although the XO proposal would satisfy the need for certainty that VoIP traffic is obligated to pay compensation, it would do nothing to alleviate the arbitrage potential inherent in an unequal comprehensive system.<sup>7</sup> The ability to audit traffic would, at best, be of limited use because it is an entirely after-the-fact enforcement tool. And carriers would have only a limited ability to dispute the representation that such traffic originates as VoIP, particularly after the fact, since the terminating carrier is unable to determine the nature of calls simply from call detail records.

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<sup>4</sup> Comments of XO Communications LLC, WC Docket No. 10-90, *et al.*, 31-34 (filed Apr. 1, 2011) (“XO Comments”).

<sup>5</sup> Comments of Vonage Holdings Corp., WC Docket No. 10-90, *et al.*, 13 (filed Apr. 1, 2011). Vonage does not identify a mechanism to identify VoIP traffic in the current calling billing records. *Id.* at 14.

<sup>6</sup> *See, e.g.*, Comments of Cox Communications, Inc., WC Docket No. 10-90, *et al.*, 6 (filed Apr. 1, 2011) (“Cox Comments”); Comments of Windstream Communications, Inc. on Section XV, WC Docket No. 10-90, *et al.*, 3-4 (filed Apr. 1, 2011); Core Comments at 10.

<sup>7</sup> Comments of Frontier Communications Corp., WC Docket No. 10-90, *et al.*, 6 (filed Apr. 1, 2011) Comments of Earthlink, Inc., WC Docket No. 10-90, *et al.*, 3 (filed Apr. 1, 2011).

The differential rate proposal would result in a flash cut to a lower compensation rate from existing charges owed on such traffic.<sup>8</sup> Yet the Commission has indicated that flash cuts should be avoided because they do not allow stakeholders to adjust operations and prevent disruptions.<sup>9</sup> Current intercarrier compensation rates have been established pursuant to complex, interrelated mechanisms that recover costs for constructing and operating a robust network that handles all types of voice and broadband traffic. In order to eventually unify all intercarrier compensation rates, a universally accepted goal, a gradual transition needs to be established that affords network providers the ongoing opportunity to recover the costs of providing the network through increased end-user charges and, where necessary, a revenue recovery fund.

ITTA submits that the proposal to establish a special rate for one type of voice calling is nothing more than a request for a government-sanctioned competitive advantage. The pricing of a certain category of voice services lower than all others that utilize the public switched telephone network (“PSTN”) in the same manner would do little to mitigate the uneven playing field (and resulting arbitrage incentives) that exist today.<sup>10</sup> The FCC should reject this uneconomic externalization of the costs of providing VoIP services by requiring that VoIP traffic pay the same compensation rates as other voice traffic.

## **II. A RULING THAT THE SAME COMPENSATION SHOULD APPLY TO ALL VOICE TRAFFIC SHOULD APPLY RETROACTIVELY TO EXISTING TRAFFIC.**

A number of carriers urge the Commission to adopt a rule that any intercarrier compensation applied to VoIP traffic should be applied only prospectively. XO

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<sup>8</sup> Cox Comments at 5.

<sup>9</sup> Notice, ¶ 12.

<sup>10</sup> Comments of CenturyLink, WC Docket No. 10-90, *et al.*, 9-13 (filed Apr. 1, 2011) (“CenturyLink Comments”).

Communications, for instance, argues that the VoIP compensation obligation should be prospective-only because there is an equally plausible argument on both sides of the debate: (1) VoIP is enhanced and therefore does not owe access, or (2) VoIP is telecommunications traffic owing access charges.<sup>11</sup> One commenter goes so far as to allege that “immediate bankruptcy” will result from a retroactive application of access charges.<sup>12</sup>

XO argues for the prospective-only application of a compensation obligation for VoIP calls because the categorization of VoIP traffic has been unclear up to now. Many commenters have pointed out, however, that whether or not VoIP is (or has been) characterized as a telecommunications or enhanced service does not change what compensation is owed.<sup>13</sup> The carrying of VoIP traffic is inherently a telecommunications function and should therefore lead to the same compensation obligation as other voice traffic that utilizes the PSTN.<sup>14</sup>

ITTA submits that failing to make the finding that VoIP should pay the same compensation as other voice calling retroactive would create an even more unstable compensation system than exists at present. A prospective-only finding could call into question the numerous adjudicative findings of courts and state public utility commissions that access charges are owed for VoIP calling.<sup>15</sup> VoIP carriers would inevitably seek to invalidate such

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<sup>11</sup> XO Comments at 25.

<sup>12</sup> Comments of Coalition for Rational Universal Service and Inter-carrier Compensation Reform on Section XV, WC Docket No. 10-90, *et al.*, 5 (filed Apr. 1, 2011).

<sup>13</sup> The ESP exemption was never applied to traffic exchanged by carriers, only to the connections between an ESP and its subscribers. CenturyLink Comments at 15; Comments of Hawaiian Telcom, Inc., WC Docket No. 10-90, *et al.*, 7 (filed Apr. 1, 2011).

<sup>14</sup> Comments of Independent Telephone & Telecommunications Alliance on Inter-carrier Compensation Arbitrage Issues, WC Docket No. 10-90, *et al.*, 15 (filed Apr. 1, 2011) (“ITTA Comments”). Indeed, access tariffs currently apply to such traffic, and many state commissions have so held. *Id.*

<sup>15</sup> See, e.g., *Palmerton Tel. Co. v. Global NAPS South, Inc.*, Docket No. C-2009-2093336 (Pa. Pub. Util. Comm., rel. Feb. 11, 2010); *Hollis Tel., Inc., Kearsarge Tel. Co., Merrimack County*

adjudicated findings. Moreover, the carriers that are currently paying access charges would likely seek to challenge the validity of their prior payments of access charges, creating a host of new disputes and lawsuits. That possibility is not theoretical given that commenters have already noted that Verizon has begun to withhold access charges on VoIP traffic,<sup>16</sup> and Sprint has been found to have violated existing law by withholding access charges on VoIP traffic.<sup>17</sup> The prospective-only application of a compensation obligation therefore would undermine the Commission's goal of eliminating arbitrage and further destabilize intercarrier compensation.

Although it clearly would have been a more prudent course of action for the Commission to have issued a ruling on the present question years ago,<sup>18</sup> ITTA submits that carriers who have been operating as if their VoIP services do not owe compensation for the use of broadband networks have made a reckless decision that is unsupported by Commission precedent. Obtaining investor dollars based on the theory that they would be able to continue to evade payment is more akin to gambling than to operating marketplace regulatory-compliant business. The Commission should carefully consider how such risky behavior could impact broadband availability. Broadband deployment funded largely through private capital, and with only limited public support, depends on compensation for the use of those networks.<sup>19</sup> The

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*Tel. Co. and Wilton Tel. Co.*, DT 08-28, Order No. 25,043 (N.H. Pub. Util. Comm., rel. Nov. 10, 2009).

<sup>16</sup> See, e.g., Core Comments at 6.

<sup>17</sup> *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, Civ. No. 3:09-cv-720, Mem. Opinion (E.D. Va., Mar. 2, 2011); *Sprint Communications Co. L.P. v. Iowa Telecommunications Service, Inc., d/b/a/ Iowa Telecom*, Docket No. FCU-2010-0001, Order (Iowa Util. Bd., iss. Feb. 4, 2011), *recon. denied*, Order (Iowa Util. Bd., iss. Mar. 25, 2011).

<sup>18</sup> In 2004, the FCC recognized that VoIP traffic should pay the same intercarrier compensation as that paid by other voice traffic. *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd 4863, ¶ 33 (2004).

<sup>19</sup> Federal Communications Commission, Connecting America: The National Broadband Plan at 3; 18-19 (rel. Mar. 2010), available at <http://www.broadband.gov/plan/>.

Commission should not be swayed by the unsupported claims of financial ruin by companies with high risk business strategies in light of the serious public interest in encouraging the construction and operation of reliable and robust network infrastructure for the benefit of paying consumers.

Some parties argue that it is illogical to impose “obsolete” access charges now, when overall intercarrier compensation rates are going to decline in the future.<sup>20</sup> This argument should be rejected. First, this is nothing more than an attempt to continue to evade paying a fair share of network costs. Reform of intercarrier compensation rates is bound to take some time, and additional years of differential treatment of VoIP traffic during that time would continue to undercompensate network providers. Second, the disruption caused by the continued arbitrage opportunities that would result would exacerbate the difficulties in finally achieving equivalent charges for all types of traffic. Third, allowing differential pricing would afford an artificial regulatory advantage to one type of competitor. Fourth, a prospective-only ruling would punish carriers who have responsibly paid access charges on VoIP services to date. Given all of these reasons, a balance between the need for adequate compensation to build networks and a lower compensation rate by network users would be better achieved through the immediate application of access charges at current levels to VoIP providers.

### **III. A VOIP COMPENSATION SCHEME SHOULD NOT BE ADOPTED TO MOTIVATE CARRIERS TO MOVE TO ALL-IP NETWORKS.**

Some commenters argue that the Commission should immediately adopt bill-and-keep or a low exchange rate for VoIP traffic because such a mechanism would encourage carriers to

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<sup>20</sup> Comments of the Voice on the Net Coalition, WC Docket No. 10-90, *et al.*, 4 (filed Apr. 1, 2011); Comments of Google Inc., WC Docket No. 10-90, *et al.*, 6 (filed Apr. 1, 2011).

move to an all-IP network.<sup>21</sup> The assumption that applying access charges to VoIP calling discourages a move to IP-based network facilities is not supported by any facts or reasonable theory. Although IP-based network facilities, such as softswitches and Session Initiation Protocol trunking, can produce efficiencies, network providers have already invested billions of dollars for network infrastructure that is in various stages of usefulness and depreciated value. Carriers make decisions on whether to add investment based on the state of cost recovery in existing networks and the efficiencies that can be gained through upgrades. The existing compensation pricing may have been originally set in a TDM-based environment, but it was designed to recover the costs of providing service that have not magically disappeared because some carriers have now adopted all-IP network architectures.<sup>22</sup> There is little doubt that carriers are and will continue to invest in IP-networks, over time, and it becomes economically and financially feasible to do so.

In the past, lawmakers have only mandated that carriers adopt new technologies to achieve specific public interest objectives.<sup>23</sup> The notion that the federal government should adopt rules that would deliberately undercompensate carriers for current operations in the hope

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<sup>21</sup> Comments of Comcast Corp., WC Docket No. 10-90, *et al.*, 4 (filed Apr. 1, 2011); Verizon Comments at 10.

<sup>22</sup> Rate-of-return carriers price compensation based on their costs of providing service. 47 C.F.R. § 61.38. Price cap carriers originally set prices based on the rates they charged under a rate-of-return system. *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶¶ 230-31 (1990) (“*LEC Price Cap Order*”). Price cap rates are now divorced from costs, and are based on more market-oriented factors. However, price cap rates still generally are based on overall cost recovery requirements.

<sup>23</sup> See, e.g., *Provision of Access for 800 Service*, CC Docket No. 86-10, 4 FCC Rcd 2824 (1989) (800 service database); *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Report and Order, 14 FCC Rcd 4151 (1999) (electronic surveillance capability).

that it would force investment in new technologies would be a level of top-down regulation that the Commission has rejected in the past.<sup>24</sup>

Prior to finally achieving all-IP networks, rates should be based on existing networks, not what is desired in the future, or what has currently only been adopted by some carriers in some places. Today's mix of TDM-based and IP-based network components will continue to exist side by side for some period of time. Pricing cannot simply be adjusted arbitrarily to assume that IP-based networks exist everywhere today. The result would be confiscatory and would undermine investment incentives. Technological efficiency will drive the decision to move to IP-based networks. The Commission can be assured that carriers will move to an all-IP network in the course of the normal investment cycle.

#### **IV. ACCESS CHARGES APPLY TO VOIP TRAFFIC.**

Several parties have repeated the argument that access charges cannot apply to VoIP traffic because VoIP technology did not exist at the time the 1996 Act was passed.<sup>25</sup> This proposition is based on the D.C. Circuit opinion in *WorldCom* addressing the FCC's ISP-bound traffic rules. In *WorldCom*, the D.C. Circuit analyzed the grandfathering provision of Section 251(g) of the 1996 Act, which continued "pre-existing obligations under a 'regulation, order, or policy of the Commission.'"<sup>26</sup> The Court found that there was no pre-existing rule that applied to

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<sup>24</sup> Forcing particular network architecture is the worst kind of government industrial policy that has long been discredited in both Democratic and Republican administrations. Public Notice, *United States Welcomes EC Statement Of Support For ITU Process On Setting New Mobile Telecommunications Standards* (January 20, 1999) (quotes from William Kennard, Chairman, FCC); Remarks of Michael K. Powell, Chairman, FCC at the National Summit on Broadband Deployment (Washington, D.C., Oct. 25, 2001).

<sup>25</sup> Comments of Sprint Nextel Corp., WC Docket No. 10-90, *et al.*, 4 n.5 (filed Apr. 1, 2011); Comments of Megapath, Inc. and Covad Communications Co., WC Docket No. 10-90, *et al.*, 7 (filed Apr. 1, 2011).

<sup>26</sup> *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002).

ISP-bound traffic and that the FCC had specifically adopted an interstate compensation rule in 2000 to apply to ISP-bound traffic.<sup>27</sup> The *WorldCom* Court addressed only dial-up, ISP-bound traffic, however, and its decision therefore is irrelevant in this proceeding. More importantly, the Court's rationale supports ITTA's position that access charges apply to VoIP traffic since the "pre-existing obligations" referred to in Section 251(g) clearly include the FCC's interstate access charge system.

Access charges have always applied broadly to *all* traffic (absent a specific exemption), even prior to the 1996 Act.<sup>28</sup> The interstate access tariffs filed with the FCC, and intrastate access charges that were largely based upon the federal system, do not vary depending on the particular technology used by the customer. For example, interstate and intrastate access charges apply to mobile traffic, even though such traffic largely originated after access tariffs were first introduced.<sup>29</sup> Therefore, Section 251(g) clearly continues to grandfather access charges applied to VoIP traffic terminating on the PSTN, even though VoIP technology itself did not exist prior to the 1996 Act.

## V. CONCLUSION

ITTA supports the FCC's efforts to comprehensively reform universal service and intercarrier compensation. There is an urgent need, however, for the Commission to act to

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<sup>27</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 9 (1999).

<sup>28</sup> The only arguable exemption, the ESP exemption, does not apply to VoIP traffic. ITTA Comments at 13; CenturyLink Comments at 15.

<sup>29</sup> *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 1034, 1043 (1996) ("*First Interconnection Order*"). Indeed, the access charge rules have always encompassed a variety of technologies and services, including but not limited to satellite and fiber optic services. If access charges were not that broad, there would have been no need to adopt an ESP exemption in the first place. *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, ¶ 83 (1983).

confirm the obligation of VoIP providers to pay access charges for calls terminated on the PSTN, and to issue rules to address phantom traffic and illegitimate access stimulation. The resulting stability will better enable the Commission to meet the goals it set in the National Broadband Plan to bring broadband to all Americans.

Respectfully submitted,

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